

9 Official Opinions of the Compliance Board 279 (2015)

◆ 1(A)(3) PUBLIC BODY: DEFINITION NOT MET BY ADVISORY
COMMITTEE CREATED BY MERIT SYSTEM EMPLOYEE WHO
WAS NOT SUBJECT TO COUNTY EXECUTIVE'S POLICY
DIRECTION

*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at
http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

September 29, 2015

Re: Citizens' Advisory Board - Traffic Issues,
Montgomery County Police Department
Ronald W. Ely and Thomas Barrett, *Complainants*

Complainants allege that the Citizens' Advisory Board - Traffic Issues ("CAB-TI"), a group that advises the Director of the Montgomery County Police Department's Traffic Division on the location of speed cameras, is a public body subject to the Open Meetings Act. Complainants state that CAB-TI has been meeting since 2008 without providing notice to the public and without keeping minutes. The Police Department responds that CAB-TI does not fall within the Act's definition of a "public body" and that CAB-TI has been operating on the understanding that it is not subject to the Act. As we will explain, we conclude that CAB-TI is not subject to the Act.

The Act defines "public body" in several ways. All focus on how the public body was created. *See* § 3-101(h).¹ Complainants assert that CAB-TI meets the definition in § 3-101(h)(2)(i). As relevant here, an entity meets that definition if it is a

multimember board, commission, or committee appointed by . . . the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the . . . chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by . . . the political subdivision [.]

¹ All references are to the 2014 volume of the General Provisions Article of the Maryland Annotated Code.

Id. No one disputes the fact that CAB-TI's membership includes at least two people who are not employed by the county. The question before us is whether CAB-TI was appointed by either the county executive or someone subject to his policy direction.

Complainants argue that the county executive has authorized the use of speed camera systems by executive order and has directed the Police Department to establish speed camera locations. Further, Complainants state, "the formation of CAB-TI is part of the implementation of that official policy." Complainants allege that several members of CAB-TI are "representatives from each of the County's Regional Service Center citizens advisory boards," which are appointed by the county executive, and that the county executive thus appoints those members of CAB-TI. Complainants also state that the division head who created CAB-TI does not have the authority to set his own policy and therefore is subject to the county executive's policy direction.

The Police Department's counsel's interviews of the County employees who were involved with CAB-TI's creation in 2006 yield the following history: At some point before CAB-TI was created, the police chief told the division directors that they could create and operate citizen's advisory boards within their divisions, as they saw fit. The director of the traffic division, Captain Didone, decided to appoint a committee to advise him on the location of speed cameras. He originally decided that the membership should include a representative of each police district's advisory board and of each of the five regional County Community Advisory boards. The district advisory board representatives were to be chosen by each district commander, and Captain Didone asked the chair of each county advisory board to designate a representative. Captain Didone also invited a county employee and a representative of an automobile association to serve on CAB-TI. Neither the county executive nor the police chief selected CAB-TI's members. Over the years, the membership has varied in size and make-up. Originally comprised of 13 members, CAB-TI now has six members, none of whom are members of either a County Community Advisory board or a county Regional Service Center board. Instead, the six members were drawn from a police district advisory board.²

The response additionally explains that Captain Didone, an employee in the county's merit system, is supervised by an Assistant Chief in the Police Department. In the county, merit system employees are appointed by, and may be removed by, the employee's department head. The police chief, head of the Police Department, is appointed by the county executive and confirmed by the county council.

² The description of CAB-TI on the county's website is apparently out-of-date.

Clearly, CAB-TI was not appointed by the county executive. That leaves the question of whether it was appointed by an official subject to the county executive's "policy direction." Read expansively, that phrase could be considered to include every official in a government's executive branch, as all such personnel are to some extent subject to the executive's policy direction. However, the legislative history of the provision, which was added to the Act in 2004, does not support that reading. As the Act stood in 2003, an entity was a "public body" under this part of the definition only if its members had been directly appointed by the Governor or the chief executive authority of a local government. Applying that definition, the Compliance Board found in 2003 that a county advisory board appointed by a department head, rather than by the county executive, was not a public body. 3 *OMCB Opinions* 325 (2003) (Opinion No. 3-15). Shortly thereafter, in its Annual Report, the Compliance Board stated that the definition "invited evasion of the Act through the chief executive's simple delegation of appointing authority to a subordinate" and that the restrictive wording of the definition was "not wise policy." Eleventh Annual Report of the Open Meetings Compliance Board (2003). Addressing that problem, the Compliance Board proposed that the definition be amended to include a multimember entity "appointed by an official of the executive branch . . . of a political subdivision" *Id.* However, the bill introduced, and adopted, in the General Assembly's 2004 session did not use the Compliance Board's wording. Instead, the bill limited the definition to entities appointed by an official subject to the executive's "policy direction." *See* Senate Bill 111 of 2004. Describing the provision in a 2005 opinion, we stated that the General Assembly "intended to address the gap in the law when a group was established by a department head or someone accountable at a policy-making level to the chief executive, rather than appointed by the chief executive personally." 4 *OMCB Opinions* 132, 138 (2005).³

Here, we do not deem Captain Didone to be subject to the county executive's policy direction for purposes of § 3-101(h)(2)(i). A merit system employee, he is neither a department head nor someone otherwise accountable to the county executive at a policy-making level. He is instead a division head who is accountable to a deputy department head who is in turn accountable to a department head. Further, although the captain acts in furtherance of county policy to establish a system of speed cameras, there is no indication that he acted at the Police Chief's behest when he created CAB-TI. We conclude that CAB-TI does not fall within the Act's definition of a public body. If the legislature intends that the Act apply to committees created by merit system employees who are not directly under the supervision of an official subject to the executive's "policy direction," then

³ The opinion is currently posted at <http://www.oag.state.md.us/Opinions/Open2004/4omcb132.pdf>. When, as is expected, this link becomes obsolete, the opinion can be accessed by going to Volume 4 of the Compliance Board's opinions.

it has the ability to amend the Act to specifically apply to such situations in the future.

Therefore, no violation of the Act occurred because CAB-TI is not a public body subject to the Act.

Open Meetings Compliance Board

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